officials are not monitoring or constraining his activities in any manner. Such a condition, which has no practical impact on petitioner unless he chooses to engage in further criminal activity by again illegally reentering the United States, does not amount to the type of legal burden that warrants this Court's certiorari review. Cf. *Spencer*, 523 U.S. at 13, 15.[2]

Second, whatever the impact of the aggravated-felony enhancement on petitioner's now-completed term of imprisonment, petitioner does not contend that the increase in his offense level had any effect on the length of his term of supervised release. In fact, Section 3583(b)(3) of Title 18 authorizes a one-year term of supervised release in this case regardless of whether petitioner previously committed an aggravated felony. Further, this Court made clear in *Johnson* v. *United States*, 529 U.S. 53 (2000), that excess prison time cannot be credited against a term of supervised release. It thus appears doubtful that resolution of the questions presented, even if petitioner prevailed, would have any effect on the length of the term of supervised release that petitioner is currently serving.

Third, according to the Bureau of Prisons, petitioner's term of supervised release will expire in eight months (on August 17, 2006). Thus, even were the Court to grant review and decide the case this Term, a decision in petitioner's favor would have at most a fleeting impact on his term of supervised release.

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[2] For that reason, petitioner's reliance (Pet. 7 n.3) on *Jago* v. *Van Curen*, 454 U.S. 14 (1981), is misplaced. There, the release of the defendant on parole did not render a case moot because of the continuing governmental control over the defendant. Here, petitioner is no longer subject to "terms that significantly restrict his freedom." *Jago*, 454 U.S. at 21 n.3.

Petitioner also argues (Pet. 7 n.3) that the case is not moot because of potential collateral consequences of the sentence. That is debatable. *United States* v. *Campos-Serrano*, 404 U.S. 293 (1971), and *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983), on which petitioner relies (Pet. 7 n.3), are inapt. Those cases were not mooted by a defendant's removal because it was the *government* that sought this Court's review to reinstate an overturned criminal *conviction*. Reinstatement of that conviction could have led to extradition of the defendants, and the existence of the convictions could have had distinct immigration consequences. See *Villamonte-Marquez*, 462 U.S. at 581 n.2; *Campos-Serrano*, 404 U.S. at 295. Here, it is the defendant who seeks review, and only of his criminal sentence—a sentence that is just months away from being fully served and that has no present-day, practical effect on his liberty.

Further, the prospective effect of the soon-to-expire sentence would arise only if petitioner again violates United States law by again reentering the United States illegally. Neither mootness principles nor this Court's certiorari practice is designed to insulate a defendant in advance from the consequences of future crimes by permitting challenges to almost-expired sentences. Petitioner himself is "able—and indeed required by law—to prevent" the adverse consequences he hypothesizes "from occurring." *Spencer*, 523 U.S. at 15 (quoting *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982)).[3]

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[3] Nor is certiorari review warranted because of the mere possibility of unspecified collateral consequences from the length of the petitioner's sentence. Cf. *Spencer*, 523 U.S. at 9-11 (citing *Pollard* v. *United States*, 352 U.S. 354 (1957), which permitted a challenge to the length of a completed sentence based on the non-specific "possibility" of collateral consequence, *id.* at 358, but criticizing *Pollard's* analysis as

Petitioner claims (Pet. 7 n.3) that the potential collateral consequences of the conviction on his future immigration status are sufficient to prolong the controversy and to merit this Court's review. That is incorrect. Petitioner fails to identify any independent impact that classifying his codeine possession conviction as an aggravated felony would have on any future immigration application, given that he already has that prior controlled substance conviction (however classified), a prior marijuana conviction, and now a federal felony conviction for illegal reentry. See 8 U.S.C. 1101(a)(43)(B) and (O).[4]

"offhand[]," effectively "abandon[ing] all inquiry into the actual existence of collateral consequences," and relying upon a misunderstanding of the constitutional importance of standing and mootness principles to the separation of powers); *North Carolina* v. *Rice*, 404 U.S. 244, 247-248 (1971) (per curiam) (challenges to completed sentences require a different mootness analysis than challenges to convictions).

[4] Amici Immigrant Defense Project *et al.* express concern (Br. 5-20) about the potential consequences in immigration cases of differing interpretations of the various statutory provisions that happen to be cross-referenced by the Sentencing Guidelines here. Whether this Court's review of the proper interpretation of the statutory definition of "aggravated felony" in immigration cases is warranted, however, would better be determined in an immigration case that actually presents such consequences and that arises directly under one of those statutory provisions. See Pet. at i, *Lopez* v. *Gonzales*, petition for cert. pending, No. 05-547 (filed Oct. 31, 2005) (presenting the question whether "an immigrant who is convicted in state court of a drug crime that is a felony under the state's law, but that would only be a misdemeanor under federal law, has committed an 'aggravated felony' for purposes of the immigration laws"). A number of courts have recognized that the definition of "aggravated felony" for criminal sentencing purposes may differ from the definition employed administratively in immigration proceedings. Compare *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 919 (9th Cir. 2004) (state drug offense is not an

2. Petitioner makes no claim that his sentence contravened any federal statutory law. Nor could he. Even without a prior aggravated felony, petitioner's 20-month sentence falls within the statutorily authorized sentencing range of two years for an illegal reentry conviction. 8 U.S.C. 1326(a).

This case thus solely concerns the court's interpretation and application of the Sentencing Guidelines. Congress has charged the Sentencing Commission with "periodically review[ing] the work of the courts, and * * * mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Given the Commission's statutory charge to resolve the type of claims raised by petitioner, this Court has adopted a policy of "restrained and circumscribed" use of its "certiorari power as the primary means of resolving such conflicts," *ibid.*, and there is no reason to depart from that practice here.

Petitioner in fact concedes (Pet. 2 n.1) that this case "formally involves" only a Sentencing Guidelines question, but urges (*ibid.*) a departure from *Braxton* because the courts of appeals' decisions have involved the interpretation of statutory provisions cross-referenced by the

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aggravated felony for immigration purposes unless it is punishable as a felony under federal law), with *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000) (felony under state law is an aggravated felony under the Sentencing Guidelines even if it is a misdemeanor under federal law), cert. denied, 531 U.S. 1102 (2001); and compare *Aguirre* v. *INS*, 79 F.3d 315, 317-318 (2d Cir. 1996) (felony under state law is not an aggravated felony precluding waiver from deportation if offense is not a felony under federal law), with *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-146 (2d Cir.) (felony under state law is an aggravated felony for Sentencing Guidelines purposes even if it is a misdemeanor under federal law), cert. denied, 528 U.S. 880 (1999).

relevant Guidelines provision. That is beside the point, because the Commission retains the authority to resolve any interpretive difficulties by either eliminating the statutory cross-references or tailoring their incorporation to conform to the Commission's intended construction. See *Neal* v. *United States*, 516 U.S. 284 (1996) (although statutory definitions control minimum and maximum sentences, noting instance in which the Sentencing Commission adopted other meanings of the same terms to determine the sentence within a statutorily prescribed range).

Indeed, the Commission has already done just that with respect to other aspects of the same Guidelines provision at issue here, adopting Guidelines-specific definitions of "felony" and "drug trafficking offense" for purposes of the upward adjustments authorized by Sentencing Guidelines §§ 2L1.2(b)(1)(A)(i), 2L1.2(b)(1)(B) and 2L1.2(b)(1)(D). Compare Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iv)) (defining "drug trafficking offense" as "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, export, distribute, or dispense"), with 18 U.S.C. 924(c)(2) (defining "drug trafficking crime" to include mere possession offenses punishable under the Controlled Substances Act and other federal drug statutes). In addition, the Guidelines already define "felony," for purposes of §§ 2L1.2(b)(1)(A), (B) and (D), as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year," *id.* comment. (n.2). Were the Commission to apply that same definitional approach to the subsection at issue here or were it to

prescribe its own clarification of the "aggravated felony" provision's compass, that would eliminate the interpretive problem that petitioner asks this Court to resolve.

3. The variations in the approaches taken by courts of appeals that petitioner identifies are not sufficiently substantial in the Sentencing Guidelines context to have had an identifiable effect on the outcome in this case, much less to warrant this Court's review.

The question presented by petitioner arises only when the prior conviction (i) is punishable by imprisonment for more than one year, but (ii) is denominated a misdemeanor under state law, and (iii) has been preceded by another state-law drug conviction. Almost every court of appeals to consider that question in the sentencing context has determined that a prior conviction like petitioner's would constitute an "aggravated felony" within the meaning of the Sentencing Guidelines, and it does not appear that any circuit would find that petitioner's drug-possession offense was not an aggravated felony.

The First and Ninth Circuits have held, like the Fifth Circuit here (Pet. App. 4a-7a), that the Guidelines' definition of "aggravated felony" includes "misdemeanors under state law that carry a sentence of at least one year." *United States* v. *Cordoza-Estrada*, 385 F.3d 56, 58 (1st Cir. 2004); *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002); cf. *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364 (1st Cir. 1996) (state offense need not be punishable as a felony under federal law, as long as the offense conduct is "criminalized under the [Controlled Substances Act]").

The First, Second, Sixth, Eighth, and Tenth Circuits likewise agree with the Fifth Circuit's ruling here (Pet. App. 7a-8a) that, because of his recidivist character, peti-

tioner's conviction for codeine possession would be a felony under federal law and thus qualifies as an aggravated felony for sentencing purposes. See *United States* v. *Forbes*, 16 F.3d 1294, 1301 (1st Cir. 1994); *United States* v. *Simpson*, 319 F.3d 81, 85-86 & n.6 (2d Cir. 2002); *United States* v. *Palacios-Suarez*, 418 F.3d 692, 694-700 (6th Cir. 2005); *United States* v. *Haggerty*, 85 F.3d 403, 406 (8th Cir. 1996); *United States* v. *Miramontes-Lamas*, No. 97-4130, 1998 WL 50955, at * 1 (10th Cir. Feb. 9, 1998) (judgment noted at 139 F.3d 913 (Table)); see *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.) (prior drug-possession offense is considered an aggravated felony if the offense is considered a felony under either state or federal law), cert. denied, 519 U.S. 885 (1996).[5]

At bottom, petitioner's broad characterization of the courts of appeals' differing approaches (Pet. 8-14) fails to recognize that *no* court of appeals has held that a recidivist conviction of a state drug offense punishable by more than one year in prison is not an aggravated felony under the Sentencing Guidelines. Petitioner has thus

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[5] The Fourth Circuit has held that a state drug-possession offense categorized by the state as a misdemeanor is not an aggravated felony, even though it was punishable under state law by more than one year of imprisonment. *United States* v. *Amaya-Portillo*, 423 F.3d 427, 430-436 (2005). But the Fourth Circuit has not specifically addressed the question whether the recidivist provision of 18 U.S.C. 844(a) may be considered in determining that the prior offense could have been prosecuted as a felony under federal law. The Fourth Circuit has held, however, that a state-law offense will qualify as an "aggravated felony" if it would be a felony under federal law. *United States* v. *Wilson*, 316 F.3d 506, 512 (4th Cir.), cert. denied, 538 U.S. 1025 (2003). It thus is doubtful that the Fourth Circuit would resolve petitioner's case differently.

failed to show that *his case* implicates any material divergence in circuit court authority.[6]

4. Contrary to petitioner's argument (Pet. 16-18), the court of appeals' decision is consistent with this Court's decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Taylor* v. *United States*, 495 U.S. 575 (1990). In *Almendarez-Torres*, this Court held that, when a prior conviction is used to enhance the penalty for an offense, it does not need to be charged in the indictment, because the prior conviction is a sentencing factor, not an element of the offense. Because petitioner's sentence does not exceed the statutory maximum for illegal reentry (with or without a prior aggravated felony), 8 U.S.C. 1326(a), the court of appeals' reference to the recidivist character of his prior drug offense occurred only in the context of determining his appropriate sentence and served only as a sentencing enhancement, which *Almendarez-Torres* specifically permits.

In *Taylor*, *supra*, this Court held that whether an offense constitutes "burglary," for purposes of the definition of "violent felony" in 18 U.S.C. 924(e), is a question of federal law that is not controlled by how a State

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[6] Petitioner's argument (Pet. 10-11) that his case might have been resolved differently if it were a civil immigration proceeding arising under the immigration laws, rather than a criminal sentencing within the framework of the Sentencing Guidelines, does not warrant this Court's review. The Sentencing Commission is not bound to adopt the same definition of sentencing terms that Congress statutorily prescribes for immigration proceedings. See *Gerbier* v. *Holmes*, 280 F.3d 297, 307 (3d Cir. 2002) ("Whatever may be the proper construction in a Sentencing Guidelines case, we do not agree that the plain meaning of 'drug trafficking crime' under § 924(c) in the deportation context encompasses state felony convictions that would merely be misdemeanors under federal law.").

might define "burglary" under state law. 495 U.S. at 590-592; see *id.* at 592-599. That case has little bearing on the questions presented here, other than to confirm the appropriateness of the court of appeals' refusal to allow the state-law characterization of petitioner's prior offense to control the federal question of whether it amounted to an "aggravated felony."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ALBERTO SANCHEZ-VILLALOBOS,
A/K/A ALBERTO VILLALOBOS SANCHEZ,
A/K/A FRANCISCO SANCHEZ SAENZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE IMMIGRANT DEFENSE PROJECT OF THE NEW YORK STATE DEFENDERS ASSOCIATION, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND IMMIGRANT LEGAL RESOURCE CENTER

IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE WRIT 5

I. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE GOVERNMENT MAY DETAIN ANY NON-CITIZEN IN ANY CIRCUIT, LEADING TO THE ARBITRARY APPLICATION OF THE AGGRAVATED FELONY LABEL 5

II. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE IT CONCERNS THE APPLICATION OF IMMIGRATION LAW'S MOST SEVERE PENALTIES 8

A. An Aggravated Felony Conviction Bars An Immigration Judge From Exercising Discretionary Authority To Permit A Non-Citizen To Remain In The United States 10

B. An Aggravated Felony Conviction Bars An Immigration Judge From Granting Asylum To A Non-Citizen Who Has Suffered Or Will Suffer Persecution In Her Country Of Origin 11

C. An Aggravated Felony Conviction May Bar An Otherwise Eligible Non-Citizen From Naturalization 12

TABLE OF CONTENTS—CONTINUED

III. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE AGGRAVATED FELONY LABEL IN SOME CIRCUITS APPLIES TO LOW-LEVEL MISDEMEANOR CONVICTIONS, MANY OF WHICH WERE ADJUDICATED IN A SUMMARY FASHION WITHOUT ANY CONTEMPLATION THAT SERIOUS CONSEQUENCES WOULD ATTACH TO THE DISPOSITION 13

IV. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE SPLIT UNDERMINES THE RULE OF LAW BY INTERFERING WITH THE ABILITY OF IMMIGRANTS TO MAKE DECISIONS CONCERNING THE RESOLUTION OF MINOR CRIMINAL CHARGES THAT MAY HAVE PROFOUND IMMIGRATION CONSEQUENCES 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Page(s)

In re Adeniji, 22 I. & N. Dec. 1102 (BIA 1999) 7

In re Yanez-Garcia, 23 I. & N. Dec 390 (BIA 2002) 1, 6

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United States v. Sanchez-Villalobos, 412 F.3d 572 (5th Cir. 2005) ..... *passim*

STATUTES

8 U.S.C. § 1101(a)(43)(B) 3

8 U.S.C. § 1101(f)(8) 12

8 U.S.C. § 1158(b)(2)(A)(ii) 12

8 U.S.C. § 1158(b)(2)(B)(i) 12

8 U.S.C. § 1158(c)(2)(B) 12

8 U.S.C. § 1182(h) 11

8 U.S.C. § 1227(a)(2)(B) 8

8 U.S.C. § 1229b(a) 10

8 U.S.C. § 1229b(a)(3) 11

TABLE OF AUTHORITIES—CONTINUED

STATUTES—CONTINUED

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DANIEL WISE, *CASELOADS SKYROCKET IN BROOKLYN COURTS: UPSWING LINKED TO NYPD NARCOTICS INVESTIGATION*, N.Y. L.J., May 22, 2000 15

STEVEN ZEIDMAN, *POLICING THE POLICE: THE ROLE OF THE COURTS AND THE PROSECUTION*, 32 FORDHAM URB. L.J. 315 (2005) 17

INTERESTS OF AMICI CURIAE[1]

The deep and growing split among the circuit courts concerning the proper application of the "aggravated felony" label to state drug offenses has broad significance for non-citizens and their advocates. Although the issues presented in this case arise in the illegal re-entry context, their resolution has profound implications for a wide array of immigration matters, including eligibility for asylum, citizenship, and basic forms of relief from removal.[2] The current circuit split regarding the application of the aggravated felony label makes it challenging, if not virtually impossible, for amici to advise immigrants effectively and to train advocates about the potential immigration consequences of misdemeanor drug possession convictions. As organizations concerned with the intersection of immigration and criminal law, amici urge the Court to resolve the important issues raised in this case.

The **New York State Defenders Association** (NYSDA) is a not-for-profit membership association of more than 1400 public defenders, legal aid attorneys, assigned counsel, and others dedicated to developing and supporting high quality legal defense

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amici state that no counsel for a party authored any part of the brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Immigration judges apply the rule of the circuit in which they sit, whether that rule was announced in an illegal re-entry or an immigration case. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394–396 (BIA 2002). Furthermore, some circuits, including the Fifth Circuit, apply the same interpretation of the aggravated felony label in illegal re-entry and immigration cases. *See, e.g., United States v. Hernandez-Avalos*, 251 F.3d 505, 509–10 (5th Cir. 2001).

services for all people, regardless of income. Among other initiatives, NYSDA operates the **Immigrant Defense Project** (IDP), which provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status and the immigration consequences of criminal convictions.

SUMMARY OF ARGUMENT

The circuit courts currently apply the aggravated felony label in sharply divergent ways. In treating petitioner's misdemeanor codeine possession conviction, with its sixty day jail sentence, as a crime within the meaning of 8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance"), the Fifth Circuit adopted one of the broadest and most far-reaching interpretations of the term "aggravated felony" that courts have thus far employed.[3]

The discord among the circuits affects individual immigrants nationwide. In accordance with long-standing practices, the Department of Homeland Security (DHS) often detains a non-citizen with a misdemeanor drug possession conviction in a jurisdiction outside the federal circuit in which the conviction occurred, and often transfers the non-citizen several times from one detention facility to another. Non-citizens convicted in New York, for example, are regularly transferred to detention facilities dispersed across the country, including the facility in Oakdale, Louisiana. Because immigration judges apply the law of the circuit in which they sit, and because DHS routinely transfers detainees from one location to another, the split among the circuits has a dramatic impact on individual immigrants.

Virtually all non-citizens, including lawful permanent residents, are deportable if they have been convicted of a drug-related offense. When that drug offense is labeled an "aggravated felony," immigration judges are barred from granting asylum and several basic forms of relief from removal, no matter how harmful removal may be for the non-citizen or his family. This is true even for lawful permanent residents who have spent most of their lives

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[3] *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005).

in the United States, asylum seekers who have experienced or reasonably fear persecution in their home countries, members of the U.S. Armed Forces, and immigrants with U.S. citizen spouses and children.

In New York, as in other states, misdemeanor cases are handled in a summary fashion, without significant procedural safeguards. The relatively perfunctory processing of misdemeanor cases is rooted in the understanding that misdemeanor defendants face less serious direct and collateral consequences as a result of conviction. Courts that would apply the aggravated felony label even to misdemeanor drug possession offenses would nonetheless bar immigrants with such convictions from discretionary relief or defenses to removal that would otherwise be available to them. Though they were convicted of the most minor drug possession offenses that exist within state penal codes, many non-citizens now find themselves subject to one of U.S. immigration law's most severe classifications.

Given the severity of the penalties that follow the application of the aggravated felony label, the uncertainty that has resulted from the circuit courts' multitude of different interpretations of the term should now be resolved. The proliferation of conflicting interpretations of the term undermines the rule of law. It is virtually impossible for an advocate to advise her client effectively about the possible future consequences of a conviction when that conviction can lead to vastly different consequences depending on where in the country that client is haled into immigration court.

Amici request that the Supreme Court grant certiorari to resolve the clear and growing circuit division about the appropriate application of the aggravated felony label.

REASONS FOR GRANTING THE WRIT

I. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE GOVERNMENT MAY DETAIN ANY NON-CITIZEN IN ANY CIRCUIT, LEADING TO THE ARBITRARY APPLICATION OF THE AGGRAVATED FELONY LABEL

There is a clear and growing split among the circuit courts concerning how to determine whether a state-law drug possession offense fits the aggravated felony definition of "illicit trafficking in a controlled substance."[4] The circuits are divided over whether a state-law offense should be considered an aggravated felony if it is a felony under state law, punishable as a felony under federal law, or, in the most extreme position (taken by the Fifth Circuit in this case), either a felony under state law *or* punishable as a felony under federal law. The circuits are also divided over the relevance of recidivist enhancements in determining whether a state-law offense should be classified as a federal felony. Finally, the circuits are divided over whether the potential punishment under state law or the classification applied by the state (i.e., misdemeanor or felony) should govern whether a state-law drug possession offense is an aggravated felony.

The split results in far more than the obvious effect of subjecting individuals with similar convictions to different law in different parts of the country. The Board of Immigration Appeals (BIA) has held that in determining whether a drug conviction constitutes an aggravated felony, immigration judges must defer to

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[4] For a complete summary of the circuit splits, see Petition of Petitioner-Appellant for a Writ of Certiorari, *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *petition for cert. filed*, No. 05-484 (Oct. 14, 2005).